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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206

In the Matter
of
ALFRED M. ROGERS,
Bankrupt.

FLORENCE HILLS ROGERS,
Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAMUEL M. CHAPIN,
Counsel for Petitioner.

RALPH H. WIENER,
Of Counsel.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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(a) The Referee in bankruptcy has no jurisdiction summarily to determine the adverse claim of a third party and

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OTHER AUTHORITY CITED:

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Florence Hills Rogers, respectfully submits this petition for a writ of certiorari for the purpose of bringing up to this court for review a decision of the United States Circuit Court of Appeals for the Second Circuit, decided on March 29, 1944, and reported in 141 Fed. (2d) 374 (637-648).* A petition to said Circuit Court

* References in parentheses, unless otherwise indicated, are to folios of printed record on appeal.

of Appeals for the Second Circuit for a rehearing (649-669) was denied without opinion on May 23, 1944 (673-675), and on May 24, 1944, said Circuit Court entered an order for mandate affirming the order of the District Court for the Eastern District of New York (682-684).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347A).

Summary Statement of Facts, the Proceedings and the Decisions Below.

Pleadings.

Solomon Raffe, trustee in bankruptcy of Alfred M. Rogers (hereinafter referred to as the "Trustee") brought on before Charles Wells Brown, a referee in bankruptcy (hereinafter called the "Referee") of the United States District Court for the Eastern District of New York, a summary turnover proceeding to compel the petitioner herein and the bankrupt (petitioner's husband) and the Equitable Life Assurance Society of the United States (hereinafter called the "Insurance Company") to turn over to the Trustee a certain policy of insurance on the bankrupt's life. The Trustee's petition in the turnover proceeding alleged: That the bankrupt had filed a voluntary petition in bankruptcy on November 17, 1939, on which date he had been adjudicated a bankrupt (12); that on May 2, 1926 the Insurance Company had issued an ordinary life insurance policy, No. 40706077,* in the amount of $25,000, upon the life of the bankrupt, in which

* This policy, for convenience, will hereinafter be referred to as "077". Another policy, No. 40706076, which also figures in the case, will hereinafter be referred to as "076".

the petitioner herein had been named as beneficiary; that the policy had been issued upon the written application of the bankrupt, and that it was in full force and effect on November 17, 1939, the date of adjudication, at which time it had a cash value of approximately Nine thousand ($9,000.00) Dollars (12-13).

The petition also stated (14):

> "That the bankrupt was, at the time of the filing of the petition in bankruptcy herein, and still is, the owner of said policy of insurance."

Nowhere in the petition was it alleged that the bankrupt, at the time of filing the petition in bankruptcy, had had *possession* of the policy.

The petitioner herein appeared specially, contesting the jurisdiction of the Referee (17). Her verified answer denied the Trustee's allegations as to the bankrupt's ownership of the policy and as to the vesting in the Trustee of the right to obtain the cash surrender value (18-19). In her answer she stated that "prior to the filing" of the bankrupt's petition she (19)

> "acquired title to said policy of insurance from the said bankrupt for a valuable consideration, and that for many years prior to the filing of the petition for adjudication herein by the said bankrupt,"

she had paid the premiums on the policy; that she had had, and still retained, physical possession thereof, and that on or about May 10, 1937 (thirty months prior to the filing of the petition in bankruptcy) she had "paid off a substantial loan on the security of the said policy" (20). In her answer, petitioner also contested the jurisdiction of the bankruptcy court over the policy or its proceeds, expressly declaring that she did "not consent" to such jurisdiction of the controversy, pointing out that the Trustee's proper remedy lay in a plenary suit (21-22).

The bankrupt also filed a verified answer in which he denied being the owner of the policy at the date of the petition in bankruptcy, and denied that the Trustee had become vested with title to the policy or the right to the cash surrender value thereof (24). Furthermore, he alleged that he had "assigned, transferred and delivered" the policy to the petitioner herein, who had paid the annual premiums thereafter (26); that on May 10, 1937 (thirty months prior to the date of the filing of the petition in bankruptcy) the petitioner herein had repaid to the Insurance Company a loan of $7,268.05 which was then outstanding against the policy (27); and that (27)

> "ever since the transfer and assignment of said policy of insurance to Florence Hills Rogers, he has had no interest therein or title thereto and the same is the sole property of the said Florence Hills Rogers."

Finally he too denied that the Referee could properly assume summary jurisdiction in the case (28).

The Evidence Adduced Before the Referee of the Adverse Claim of the Petitioner Herein.

The policy in question, 077, was produced at the hearing before the Referee by the attorney for the petitioner herein (40) after the bankrupt's attorney had stated it was not in the bankrupt's possession (39).

Having several times voiced their objections to the jurisdiction of the Referee on the ground that the Referee had no power to retain jurisdiction summarily to determine, in a turnover proceeding, the controversy as to ownership of policy 077, since petitioner's claim of ownership of said policy was adverse as distinguished from colorable, which objections were rejected by the Referee (37-38, 283-285), the attorneys for petitioner herein called her as a witness. She testified that she had had possession of policy 077 (288) and that such possession had dated from two or three days before the occasion, during

the month of April 1937, when she went to the Insurance Company's office to arrange to pay off a loan on said policy (293-294). She testified that she had had continuous possession of the policy ever since April 1937, and had kept it in her vault at the New Rochelle Trust Company (294-295). Relating the circumstances under which she had obtained policy 077, the petitioner herein testified that her husband had physically turned it over to her in April 1937 when he found it impossible to pay the premiums himself; it was arranged that she should "adjust" the policy and carry it (300-301). At that time the cash surrender value of 077 was $7,525, but the outstanding loan on said policy was $7,268.05, leaving a total net value of only $501.70, even after taking into account a dividend due (174-175).

On May 10, 1937 (70-71) Mrs. Rogers paid off the said loan of $7,268.05 on policy 077 to the Insurance Company through a cash surrender transaction on another policy, 076 (70-71), on the life of the bankrupt, which policy had been in her possession as assignee-owner since 1928 (110-112). She testified that on surrendering her policy 076 for the purpose of deriving funds with which to pay off the loan outstanding on 077 she physically delivered 077 to the Insurance Company (302-303). Petitioner testified that at the conclusion of the transaction whereby she surrendered 076 to pay off the loan on 077 the latter policy had been returned to her by the Insurance Company (304). Thereafter she had continually kept policy 077 in her possession (304-305). She testified further that thereafter she had paid the premiums on policy 077 (305) and identified four of her checks (305; Resp. Exhs. 8A-8D inclusive, reproduced in record at page 147) drawn on her own personal account as having been in payment of those premiums.

The petitioner maintains an individual account in the New Rochelle Trust Company in her own name (235). This account had been transferred out of a joint account in the names of the bankrupt and the petitioner on Sep-

tember 29, 1936, the credit balance in said joint account, in the amount of $2,901.72, being then placed in the petitioner's account (236-8). The joint account, which lasted from October 30, 1926 to September 29, 1936, with power to either party as signatory (238) had itself been, in turn, a successor to the petitioner's own individual account which dated back to June 1912 (272).

The petitioner testified that the bankrupt had never made any deposits in, or withdrawals from the New Rochelle Trust Company account when it was in the joint names of the bankrupt and herself (312-313). There was also testimony by the manager of the said Trust Company that an examination of the joint account and of the prior individual account of the petitioner, undertaken at the request of counsel for the Trustee, had revealed no checks drawn by the bankrupt on either account (273-274).

On cross examination the petitioner herein testified that policy 077 had been kept in her New Rochelle Trust Company vault which she had maintained for about thirty years (314). The bankrupt had never used this vault for his personal purposes, and he had entered the vault only in company with her (315). She testified that this vault contained her own matters and not those of her family (317-320).

The assistant Registrar of the Insurance Company testified to the receipt from the petitioner herein of a letter dated April 5, 1938 to the effect that premium notices on 077 should be sent to her, and that she would "take care of same" (138-139; Resp. Exh. 10B, Record, at p. 149). This letter was written by the petitioner shortly prior to May 2, 1938, which was the anniversary date of the policy (p. 1 of Trustee's Exh. 1, Record, p. 123) and the first date during her ownership on which a premium payment would be due. The officer of the Insurance Company also testified that, although the form authorizing the application in 1936, the year *prior* to the assignment, of the current dividend on 077 to the payment of the premium then due, was signed by the *bankrupt* as "owner" (177-

178, 446; Resp. Exh. 11), similar forms relative to the 1939 and 1941 dividends had been signed by the *petitioner* herein as "owner" (178-181, 447-448; Resp. Exhs. 12, 13). The Company applied the dividends as requested by the petitioner in said years. He also testified that although, according to the Insurance Company's records, the bankrupt was "considered" the owner of 077 on or about May 2, 1939 (193-194), and had the authority to apply for a loan and make application for its surrender value (197-198), *the Insurance Company would require the physical delivery of the policy before paying out the surrender or loan values* (199).

There was evidence introduced before the Referee which, it was claimed, tended to contradict the petitioner's claim of ownership of 077. However, as shown *infra*, evidence militating against the merits of petitioner's claim is not material to a determination of the existence of an adverse claim.

On a consideration of all the evidence pro and con, the Referee saw fit to disbelieve the proof of petitioner's ownership. Having determined the issue of ownership on conflicting evidence in favor of the Trustee, the Referee, in effect, held that by reason of such determination on the merits, the claim of petitioner was "colorable", and being merely colorable, the Referee could properly retain jurisdiction in the turnover proceeding summarily to order a surrender of the claimed policy.

The Referee having overridden all objections by the Insurance Company, the bankrupt and the petitioner herein of his assumption of summary jurisdiction, rendered his decision on February 25, 1942 to the effect that the policy should be turned over to the Trustee (452-70), implementing this decision with an order on March 2, 1942, directing the bankrupt and the petitioner herein to turn over policy 077 to the Trustee and to execute all necessary papers to enable the Insurance Company to pay the cash surrender value of $9,270.70 to said Trustee (471-478). The petitioner filed a petition to review the

Referee's order (479-93) which was dismissed on June 17, 1942 by an order (520-524) of Judge Abruzzo of the District Court for the Eastern District of New York with an opinion (511-519). On July 2, 1942 petitioner filed a notice of appeal to the Circuit Court of Appeals for the Second Circuit, which Court, on March 29, 1944 handed down a decision affirming with an opinion (637-648) (reported in 141 Fed. (2d) 374) the decision of the District Court. On May 23, 1944 the Circuit Court of Appeals denied, without opinion, a petition for rehearing (674). On May 24, 1944 said Court entered an order for mandate affirming the order of the District Court (684).

In the petitioner's brief hereto appended (pp. 20-21) it is shown to be the general rule in the various circuits (except that by the decision below in this case it is no longer the rule in the Second Circuit) that in determining whether or not he has summary jurisdiction to order a turnover, a Referee in bankruptcy may conduct a hearing only to a point where it appears that the respondent is making a claim adverse to the Trustee, supported by testimony, which, if true, would make the claim valid. The Referee may not weigh testimony against testimony to determine where the truth lies. That function is reserved to the finders of the facts at a plenary trial.

The correct test as laid down in the case of *In re Yorkville Coal Co.* (C. C. A. 2d Cir. 1914), 211 Fed. 619, 621, which represented the law applied in all circuits (including the Second Circuit prior to the decision in the case at bar by the Circuit Court Appeals of the Second Circuit) is as follows:

> "The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant."

In the case at bar the decisions of the Referee, the District Court and the Circuit Court of Appeals all confirm

the summary jurisdiction of the Referee on the specious reasoning that the petitioner's claim was "colorable". However, a mere reading of the recital of facts as set forth in the opinions of the Referee (453-470), the District Court (511-519) and the Circuit Court of Appeals (640-648) shows that the petitioner's claim was clearly "adverse" within the test that "if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant". Each of said decisions reveals that the Referee had weighed conflicting testimony and other proof, found certain evidence to be true and certain evidence not to be true, and determined on the merits that the petitioner had not sustained her burden of proving ownership of the policy. Both the District Court and the Circuit Court of Appeals treated the decision of the Referee with the sanctity accorded to a solemn judgment of a Court, holding that since the conclusion arrived at by the Referee on the merits of the controversy was not clearly erroneous, the Referee's decision would not be disturbed. The District Court and the Circuit Court both accorded mere lip service to the rule that a Referee has no jurisdiction to determine a controversy between a Trustee and a third party presenting an adverse claim. Said rule prevailing in other circuits was tortured by the holdings below that since the Referee's conclusion from the testimony that petitioner was not the owner, was supported by the record, the petitioner's claim was, therefore, *ipso facto* "colorable" and hence the Referee had jurisdiction summarily to proceed to a determination of the controversy.

The following excerpts from the opinions below indicate conclusively that the alleged finding by the Referee that petitioner's claim was "colorable" is a clear misnomer for what was patently a determination by the Referee on the merits, based on conflicting testimony, that the petitioner had not sustained her (alleged) burden of proof

by a fair preponderance of the credible evidence. The Referee in his decision said, in part:

> "This (referring to testimony adduced by the Trustee and tending to contradict the petitioner's testimony), taken together with the other testimony herein, leads me to the conclusion that the claim * * * must be disregarded * * * the assignment (of the policy) is based entirely upon the parol testimony of Mrs. Rogers. And what is more, is not supported by any corroboration whatsoever (456). * * * There was no proof presented to me to show that Mrs. Rogers requested the insurance company to note on their records that she was the owner of the policy (459). * * * All the testimony of Mrs. Rogers concerning the so-called oral assignment, possession and ownership of the policy stands entirely alone without corroboration and with the bankrupt absent from court (462). * * * Even assuming that there may be a valid oral assignment of an insurance policy, the burden is upon Mrs. Rogers to establish it by a fair preponderance of believable evidence (465). * * * I find that the claim of Mrs. Rogers is colorable and without substance and subject to the summary power of this court (469)."

In its opinion the District Court for the Eastern District, in dismissing the petition to review the determination of the Referee, made the following statements with respect to the merits of the controversy:

> "The trustee claims that Mrs. Rogers, wife of the bankrupt, paid the premiums on the life insurance policy in question out of the money obtained in surrendering the $50,000 policy for its cash value. The testimony discloses that at least some of the premiums were paid or could have been paid out of that fund. There is some confusion as to the bank accounts held by Mrs. Rogers. * * * The referee was of the opinion that these funds were apparently being held by her as agent for her husband. The referee found that there had been no oral assignment of the policy; that the bankrupt was the owner of same (515). * * * In his order of March 2, 1942, the referee directed

payment of the cash surrender value of the policy to the trustee. His decision upon which the order was based contains a resume of the testimony offered before him together with his findings on that testimony. The referee was amply justified in arriving at his conclusions. The court concurs in the referee's findings (517). * * * The petitions for review are dismissed and the order of the referee of March 2, 1942 is affirmed."

By concurring in the Referee's findings, the District Court's decision generated a novel doctrine of federal law, to wit, that as the Referee's conclusion, based upon the presentation to him of contradictory testimony, was "amply justified" by evidence sufficient to support his judgment, the claim of the petitioner herein was "colorable and without substance and subject to the summary power" (469) of the Referee.

The following excerpts from the opinion of the Circuit Court of Appeals for the Second Circuit show that the "colorableness" of the claim of a third party claimant, under the rule of the decision below, follows as a natural course whenever there is sufficient evidence in the record to support the Referee's conclusion on the merits of a controversy involving a contested issue of fact:

"The appellant was the only witness who testified in support of her claim of ownership of the policy by oral assignment. * * * It appeared that for a time her husband did have joint access with her to the safety box in which the policy was kept, but whether or not that was so up to the time of his adjudication was uncertain. * * * the failure of her husband to testify in corroboration of her claim was explained only by her own testimony * * *. Obviously the appellant was an interested witness whose credibility was to be determined in the light of all the circumstances. The referee before whom she testified as to the oral assignment under which she claimed was not satisfied that the premiums she paid by checks were in effect paid out of her own funds in view of what was shown as to her financial relations with her

> husband. Furthermore, her unexplained failure to notify the insurer of the assignment of the policy * * * was a circumstance which he properly thought should be considered in connection with her testimony.
>
> The district judge likewise concluded that her evidence of the oral assignment could not be taken at face value, and we cannot say that the conclusion was clearly erroneous. That being so, the policy remained the property of the bankrupt, since no assignment of it was proved. As the appellant's claim in these proceedings was thus shown to be merely colorable, the summary jurisdiction of the court was properly invoked and exercised."

The Circuit Court's statement in its opinion that "since no assignment of it was proved" the policy remained the property of the bankrupt, indicates that the Circuit Court was approving of the decision of the Referee that in a turnover proceeding brought by a Trustee against a third party claimant the burden of proving ownership was on the claimant (and this notwithstanding the fact that in such a proceeding the claimant was the respondent or defendant and had possession of the policy).

The petitioner presents this petition because of the importance of the federal question involved and for the reason that the decision below has created a conflict in the various Circuit Courts of Appeals as to the definition of the word "colorable" within the meaning of the rule that where the claim of a claimant is "colorable" as distinguished from "adverse" a Referee in bankruptcy has jurisdiction summarily to order a turnover. Thus, in various circuits other than the Second Circuit the rule is accepted as established that (a) once the claim of a third party is shown to be adverse the referee has no jurisdiction to proceed with a hearing, but the merits of the claim can be determined only in a plenary suit brought before a court, and (b) where a claim is colorable (or not adverse to the trustee) the referee has summary power to order the claimant to turn over to the trustee the prop-

erty colorably claimed. By federal rule of law enunciated by various Circuit Courts of Appeals, it is held, and under former decisions handed down by the Circuit Court of Appeals for the Second Circuit it had been held, that the test of an adverse claim is whether, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant (see brief hereto appended at p. 22). By its decision below the Circuit Court of Appeals for the Second Circuit has, in effect, redefined "colorable" claims so that a colorable claim is one which the Referee, after full hearing of a controversy, determines to be unsupported by the weight of the credible evidence. Inferentially and quite obviously, an "adverse" claim, by such decision, is restricted to (a) one which the Referee finds, after weighing the evidence, is supported by the proof, or (b) a claim which, on review by the court from a Referee's decision in favor of the Trustee, is found to be uncontradicted by any evidence whatsoever in the record sufficient to support a finding in favor of the trustee.

By such disarmingly simple expedient of redefining terms, the Circuit Court of Appeals for the Second Circuit has effected a startling revision of the powers and jurisdiction of a Referee in bankruptcy. Under its decision a Referee in bankruptcy attached to any District Court situate in the Second Circuit is not required, as he would be in other circuits, to relinquish jurisdiction in favor of a plenary suit before a court as soon as a preliminary investigation reveals that an adverse claim has been presented by the claimant, but may conduct a hearing, and by the expedient of calling "colorable" a claim founded on testimony which he is inclined to disbelieve as unsupported or contradicted by what he regards as the weight of the credible evidence, is empowered to render a summary and binding decision on the merits against the claimant. By this far-reaching change in federal law the Circuit Court of Appeals for the Second Circuit has allocated to the Referee powers hitherto universally regarded by bench and bar as reserved to the courts.

The effect of the decision below in this case was to deprive the petitioner of her constitutional right to a trial by a court and jury, since the Referee's decision on the merits, under the language of said decision of the Circuit Court, is conclusive in the event, here present, that the record contains the bare skeleton of evidence required on an appeal to support a decision involving a contested issue of fact.

Under the guise of redefinition of the terms "colorable" and "adverse" the decisions below, while giving verbal respect to the rule prevailing in other circuits that a Referee is without jurisdiction to try an adverse claim, have, perhaps unwittingly, enlarged the jurisdiction of a bankruptcy Referee so that, in controversies with third party claimants, the Referee acts not as a mere aid, but as the *alter ego* of the court.

By sheer casuistry the courts below have established a rule whereby a claimant's right to a plenary suit is foreclosed provided only that the Referee's conclusion arrived at in a summary turnover proceeding on the merits of the claim is not clearly erroneous. The ease with which such condition can be met in controversies involving contested issues of fact and credibility of witnesses is tantamount to barring a claimant's right to a plenary suit in every case.

Having found support in the record for the Referee's conclusion that the policy was not the property of the petitioner, the Circuit Court of Appeals determined that the decision of the Referee in favor of the Trustee was not clearly erroneous, and that, hence, "the appellant's claim in these proceedings was thus shown to be merely colorable" (647).

While effecting a most drastic change in the federal law pertaining to the summary powers of a Referee in a case of this kind, the opinions of the courts below purport to take respectful notice of and to agree with the rule that a Referee has no summary jurisdiction to determine an adverse claim. However, the spirit of the rule is violated, for under the rule of the courts below

hardly any claim can ever be "adverse". The courts below have created a dangerous precedent which, if allowed to stand, will mean that referees are authorized vastly to enlarge the scope of their jurisdiction in summary proceedings. Apparently a mere disinclination by a Referee to accept the testimony of an interested witness at face value is sufficient *per se* to attach finality to a finding that a claim is colorable. A by-product of the rule announced below is that every adverse claimant who turns out to be the unsuccessful litigant in a turnover controversy involving a contested issue of fact before a Referee is stigmatized as a colorable claimant. By the same token the claimant is deprived of his constitutional right to a trial by court and jury.

Under the decisions below the right of a third party claimant to a plenary trial of a controversy would be insured only in the speculative and highly unlikely event that a ruling by the Referee in favor of the Trustee rejecting the merits of the claim is held on an appeal to have been unsupported by any evidence in the record sufficient to spell out a cause of action in favor of the Trustee. Only in such remote event would the court below, under its instant decision, disturb a finding by a Referee that a claim is "colorable". Since records on appeal in controversies involving contested issues of fact, which do not contain conflicting testimony or contradictory proof, are as rare as the proverbial needle in a haystack, a conclusion against a claimant made by a Referee on the merits can rarely, if ever, be reversed as "clearly erroneous". Thus, the practical result is that the Referee is enabled to bolster his jurisdiction by merely finding, on contradictory evidence, that the claim is untenable, and, hence, "colorable".

It is for this Court to settle this important question of federal law by determining (1) whether a third party claimant does not make out an adverse claim sufficient to withdraw the controversy from the jurisdiction of a referee by merely adducing proof which, if submitted to a court and uncontradicted, would be sufficient to support a judgment in favor of the claimant, and (2) whether once a

prima facie claim is presented to the Referee supported merely by testimony of an interested witness sufficient to warrant submission to a court or jury, the claimant is entitled to a plenary trial and the Referee is required to relinquish jurisdiction and may conduct no further hearing, with a view to determining the controversy on the merits, even where it is the Referee's opinion, based on the credibility of the witness, etc., that a decision in favor of the claimant would be contrary to the weight of the credible evidence.

It is submitted that the new rule of law effected by the decisions below operates most unfairly and unjustly to a claimant. In the hearing before the Referee the petitioner herein, not anticipating that the Referee would refuse to yield jurisdiction after receiving preliminary proof of the existence of an adverse claim, necessarily was unprepared to adduce the same quantum of proof of the merits of her claim as petitioner would have undertaken to prepare to prove at a plenary trial brought on for hearing in the usual manner. The harsh effect of the rule announced below is that the claimant, at a summary hearing before a referee, brought on quickly by order to show cause, would have to be prepared on very short notice not merely to make out a preliminary showing or prima facie case of the existence of an adverse claim, but to prove such claim by the fair preponderance of the credible evidence. Such proof, naturally, entails the marshalling of all available witnesses and the collation of all relevant evidence, normally an arduous and time-consuming preparation. The difficulties imposed on a claimant and the possibilities of harassment to which a claimant is subjected in being required to prepare for a full trial of a controversy, involving hotly contested issues of fact, to be tried on short notice, are self-evident. A claimant's dilemma is accentuated by the erroneous rule announced below (465-466) putting the burden of proof on the claimant. The plight of a claimant hailed summarily before a referee is unenviable, for a refusal by a referee in a

summary proceeding to yield jurisdiction, followed by a decision dismissing the claim as colorable could never, as a practical matter, be subject to reversal, there being always enough proof in a record containing conflicting testimony to support a finding either way. By such practice a referee becomes not the arm of the court, but the court itself.

The broad, tyrannical implications of the rule announced below are that, if followed in other circuits, adverse claimants hailed into court on orders to show cause returnable on short notice before referees in bankruptcy in the various District Courts situate in the United States would be subject to the sweeping summary jurisdiction of the bankruptcy referee, contrary to and in violation of the constitutional right of adverse claimants to a trial by a court, and, where demanded, by a jury.

It is submitted that if the rulings below are allowed to go unchallenged by failure to review, on writ of certiorari, the decisions rendered below, the door will have been opened for striking down, indirectly and by sophistical reasoning, the grant of right to trial by court and jury, guaranteed by the Federal constitution.

The rule formerly followed in the Second Circuit, and still followed in other circuits (see brief appended hereto, pp. 20-22), that an adverse claimant is entitled to a plenary trial before a court and jury is as effectually abolished by labelling as "colorable" a claim disbelieved or disproved at a hearing as if the decision of the Circuit Court of Appeals below had stated in *haec verba* either that an adverse claim of a third party constitutes a controversy determinable on the merits by a Referee in bankruptcy, or that, in a controversy between a trustee and a third party brought on by a summary turnover proceeding, a Referee in bankruptcy may exercise the power and jurisdiction of a court, and his determination on the merits of such controversy has the same finality as a judgment of a court of justice and is reviewable only if his conclusion is clearly unsupported by any evidence in the record.

It is submitted that the Circuit Court of Appeals for the Second Circuit has decided erroneously an important question of federal law which should be settled by this Court. The decision below overturns an established practice in bankruptcy causes of relegating the determination of controversies between trustees and adverse claimants to plenary suit before the court. The conflict in the opinions of the respective Circuit Courts of Appeals, referred to in petitioner's brief hereto appended, should, in the interests of uniformity, be decided by this Court. There is an abundance of turnover proceedings brought on by orders to show cause before the numerous referees in bankruptcy sitting in the various District Courts for summary disposition. The decision of the Circuit Court below in this case is likely to cause future uncertainty on the question here raised for settlement by this Court. Unless corrected by this Court, the effect will be to create regrettable confusion. It is submitted that the question which this application suggests should be definitely settled.

Your petitioner presents herewith, as a part of this petition, a certified copy of the transcript of the record in the courts below, and will present its brief for consideration with this petition.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari should be granted to the Circuit Court of Appeals for the Second Circuit, so that its decision affirming the order of the District Court, should be reviewed by this Court, and that your petitioner may have such other and further relief as this Court may deem proper.

Dated, June 21, 1944.

FLORENCE HILLS ROGERS,
Petitioner.

By: SAMUEL M. CHAPIN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No

In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are stated in the petition, *supra*, pages 2-12.

POINT I.

The decision sought to be reviewed is in direct conflict with decisions of this Court and of other Circuit Courts of Appeals which hold that

(a) The Referee in bankruptcy has no jurisdiction summarily to determine the adverse claim of a third party and

(b) An adverse claim is made out by presenting sworn testimony which, if believed by a court, would support a finding for the claimant.

The Referee below rejected the claim of petitioner herein after weighing what he regarded as conflicting testimony adduced by the Trustee and the petitioner (462-4, 466-7).

It is now the law in all jurisdictions (except in the Second Circuit) that in determining whether or not he has summary jurisdiction to order a turnover, a Referee in bankruptcy may conduct a hearing only to the point where it appears that the respondent is making a claim adverse* to the Trustee, supported by sworn testimony which, if true, would make the claim valid; the Referee may not weigh testimony against testimony to determine where the truth lies. That function is reserved to the finders of the facts at a plenary trial.

This Court recognized this rule in *Harrison* v. *Chamberlin* (1926), 271 U. S. 191, where it stated (p. 194):

> "In the present case it clearly appears that the validity of the respondent's claim depended upon *disputed facts, as to which there was a conflict of evidence*, as well as a controversy in matter of law. * * * *It was therefore substantial, and not merely colorable;* and its merits could only be adjudged in a plenary suit." (Italics ours.)

In accord, see

Babbitt v. *Dutcher* (1916), 216 U. S. 102, 114;

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* See *In re Blum* (C. C. A. 7th Cir. 1913), 202 Fed. 883, where the court wrote (p. 884):

> "The term 'colorable' seems to have crept into the bankruptcy decisions without authority of statute, unless it be construed to mean merely that if a respondent sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse and not colorable, and not within the jurisdiction of the referee."

Jaquith v. *Rowley* (1903), 188 U. S. 620, 625;
Mueller v. *Nugent* (1901), 184 U. S. 1, 15;
In re Blum (C. C. A. 7th Cir. 1913), 202 Fed. 883, 884;
Cooney v. *Collins* (C. C. A. 9th Cir. 1910), 176 Fed. 189, 192;
In re Farrow (D. C. D. Mass. 1926), 13 Fed. (2d) 261;
In re Green (D. C. E. D. Pa. 1913), 207 Fed. 693, 695;
In re Tarbox (D. C. D. Mass. 1910), 185 Fed. 985.

See also *In re Goldstein* (C. C. A. 7th Cir., 1914), 216 Fed. 887, where the court said at pages 888-889:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts, which, if true, would show title and possession antedating the petition in bankruptcy. *A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit.*" (Italics ours.)

The rule in the Second Circuit was formerly in complete harmony with that approved by this Court and applied by other Circuit Courts of Appeals. See

In re Midtown Contracting Co. (C. C. A. 2d Cir. 1917), 243 Fed. 56, cert. den. 245 U. S. 654;
In re Yorkville Coal Co. (C. C. A. 2d Cir. 1914), 211 Fed. 619;
In re Paramount Fireproof Door Co. Inc. (D. C. E. D. N. Y. 1930), 43 Fed. (2d) 558, 559;

In re Sheinbaum (D. C. S. D. N. Y. 1901), 107 Fed. 247.

Thus in *In re Yorkville Coal Co., supra*, the problem as to the Referee's proper function was concisely posed as follows (p. 620):

> "The question which comes before this court is whether a bankruptcy court in a summary proceeding to determine whether an adverse claim existed in fact at the time of the filing of a petition in bankruptcy or was simply 'colorable', has a right to pass upon the truthfulness of the witnesses and the weight of the testimony and thus determine the merits of the claim."

To that question a negative answer was given, the court declaring that the bankruptcy court should not (p. 620) "weigh testimony against testimony" and could not (p. 620) "find certain testimony to be true and certain testimony not to be true". The correct test (albeit by the decision below no longer the rule in the Second Circuit) as laid down in the *Yorkville Coal Co.* case, *supra*, is as follows:

> *"The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant."* (Italics ours.)

However, a serious doubt was generated as to the authority of the foregoing decisions in the Second Circuit by the opinion rendered in 1939 by the Circuit Court of Appeals for the Second Circuit in the case of *In re Meiselman*, 105 Fed. (2d) 995, where the court, although holding that the claims there considered were "substantial controversies" and "that consequently the referee had not jurisdiction to pass the summary order" (p. 1000) said by way of dicta (p. 998):

> "We do not interpret these decisions as requiring the holding that there is reasonable doubt from the

> claimant's own testimony alone, when it is disbelieved by the referee * * *. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest * * *."

Said dicta by the Circuit Court for the Second Circuit in the *Meiselman* case, *supra*, was translated into the law of the Second Circuit by the decisions below, which clearly change the rule previously recognized in the Second Circuit and hold, in conflict with decisions of this Court and of other Circuit Courts of Appeals, that

(a) A referee in bankruptcy may weigh the merits of a controversy in a summary turnover proceeding.

(b) A referee's determination on the merits of a controversy involving a contested issue of fact is not reversable unless "clearly erroneous".

(c) As the petitioner (defendant in the summary proceeding) was found not to have sustained her burden of proof of ownership, "the (petitioner's) claim in these proceedings was thus shown to be merely colorable", and that, therefore, "the summary jurisdiction of the court was properly invoked and exercised" (647).

CONCLUSION.

In view of the foregoing, it is respectfully submitted that a writ of certiorari be granted.

Respectfully submitted,

SAMUEL M. CHAPIN,
Counsel for Petitioner.

RALPH H. WIENER,
Of Counsel.

(9)

AUG 8 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206

In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HILBERT I. TRACHMAN,
Counsel for the Respondent.

HILBERT I. TRACHMAN,
IRVING R. KROSNER,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.

In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioner Florence Hills Rogers, wife of the bankrupt, petitions for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Second Circuit, of March 29, 1944, and reported in 141 Fed. (2d) 374 (R. 630, 637-648).

The order of the Referee in Bankruptcy (R. 174-175), affirmed by the District Court (R. 174) and the Circuit Court of Appeals (R. 213-216) adjudicated: that a policy of life insurance number 4076077 (hereinafter referred

to for convenience as "#077"), issued by the Equitable Life Assurance Society of the United States (hereinafter referred to as the "Insurance Company") upon the life of the bankrupt, passed pursuant to Section 70 (a), subdivision 5 of the Bankruptcy Act, to the Trustee in Bankruptcy; that the Trustee was entitled to the cash surrender value as of the date of bankruptcy $9,270.70; gave the bankrupt an opportunity to pay the cash value and then carry said policy free from the claims of creditors; and upon his failure to pay the cash value directed that the policy be turned over to the Trustee and that the bankrupt execute such papers as might be required by the Insurance Company to effectuate the payment of the said cash value to the Trustee (R. 157-160).

Summary of Respondent's Points.

I. The decision of the Second Circuit Court of Appeals in this case is not in conflict with "the decision of another Circuit Court of Appeals on the same matter".

All decisions in other circuits relied upon by the petitioner as creating the alleged conflict were superseded by this court's decision in *Harrison* v. *Chamberlin*, May 3, 1936, 271 U. S. 191, 46 S. Ct. Reporter 467.[1]

II. The decision of the Second Circuit Court of Appeals is not "in conflict with applicable decisions of this Court".

The petitioner's claim was "colorable" in full con-

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[1] The said cases cited by the petitioner on the question of a conflict are *In re Blum*, 202 Fed. 883 (C. C. A. 7th Cir. *1913*), *Cooney* v. *Collins*, 176 Fed. 189 (C. C. A. 9th Cir. *1910*), *In re Goldstein*, 216 Fed. 887 (C. C. A. 7th Cir. *1914*), *In re Green*, 207 Fed. 693 (D. C. E. D. Pa. *1913*), *In re Tarbox*, 185 Fed. 985 (D. C. D. Mass. *1910*). *In re Farrow*, 13 Fed. (2d) 261 (D. C. D. Mass. 1926) was decided two days after this court's decision in *Harrison* v. *Chamberlin*, *supra*, and the District Judge who wrote that opinion took another view after the *Harrison* v. *Chamberlin* decision. *In re White* (1928), 25 Fed. (2d) 341.

formity with this Court's decision in *Harrison* v. *Chamberlin, supra.*

III. In any event, irrespective of the "colorability" of petitioner's claim, the Bankruptcy Court had summary jurisdiction.

IV. There is no important question of Federal law involved which has not been heretofore settled by this court.

V. The controversy between the parties has become moot.

The bankrupt, in proceedings instituted by him subsequent to the entry of the turn-over order, acknowledged his ownership of policy #077; the policy was surrendered by the Bankrupt to the Trustee, and the cash value directed to be paid to the Trustee was paid to him.

The Proceedings and Evidence in the Courts Below.

We are obliged to set forth in some detail the proceedings in the courts below in order that this court may have before it the necessary facts upon which we base our Point IV, that the controversy between the parties has become moot.

It also becomes necessary to give a review of the evidence, more extensive than usual, because the petitioner has seen fit to select only certain portions of the evidence and has colored her interpretation of this evidence to suit her purpose.

A. The Proceedings.

Alfred M. Rogers, the husband of the petitioner, filed a voluntary petition in bankruptcy on November 17, 1939 and was immediately adjudicated a bankrupt. He sched-

uled liabilities of $154,947.39 and no assets of any value, except wearing apparel of $150, for which he claimed an exemption. He neither scheduled nor claimed any exemption for any insurance policy (Tr. Ex. 14, R. 137, 186).

The investigation conducted by the Trustee in Bankruptcy disclosed, that in an attempt to make himself judgment proof, the bankrupt, without consideration, transferred to his wife and two children assets of the face value of over two million dollars, exclusive of policy #077 (R. 187). After the said policy was unearthed by the Trustee, he instituted turn-over proceedings, upon due notice, to reach the cash value of the said policy #077 as of the date of bankruptcy (R. 2-5).

The answers filed by the bankrupt and the petitioner (R. 6-7, 8-10) were in substance: that the bankrupt had assigned the policy to his wife about two years before the petition in bankruptcy was filed; that the petitioner was an adverse claimant and objected to the summary jurisdiction of the Bankruptcy Court. It later developed that the claimed assignment was an oral one.

The order to show cause was returnable on September 10, 1941, the issues were tried and proof was taken on three dates: October 21, 1941 (R. 12-47); October 29, 1941 (R. 48-83); and January 7, 1942 (R. 122). At no time did the petitioner request an opportunity to submit any additional evidence or even suggest to the Court that she had other evidence to submit.[2] Indeed, the petitioner's counsel at the conclusion of the hearings stated (R. 116):

"Mr. Chapin: The respondent rests its case."

The Referee filed his decision granting the Trustee's petition on February 25, 1942 (R. 151 *et seq.*) and an

[2] Petitioner's implication (p. 16 of her brief) that a summary proceeding did not afford her an opportunity to marshal all her witnesses and her evidence is belied by the fact that almost a month elapsed between the return date of the notice and the first hearing date, and more than two months had elapsed thereafter before the hearings were completed.

order thereon was entered on March 2, 1942 (R. 157 *et seq.*).

Petitions to the District Court to review the Referee's said order were filed by the bankrupt and his wife (R. 160-164) and were heard on March 25, 1942 (R. 165, fol. 195; R. 189, fol. 566). On the same day there was also heard by the same District Judge, the Trustee's motion to punish the bankrupt and his wife for contempt of court for failing to comply with the Referee's said order of March 2, 1942.

The District Judge was requested by counsel for the bankrupt to hold in abeyance his decisions on these motions until there had been decided another motion which would be heard that very day by the Referee, which had been made by the bankrupt to amend his schedules so as to include said policy #077 as his own asset and to have it declared exempt (R. 177-182).

By his motion papers the bankrupt first sought to amend his schedule by listing his policy as an asset, with the statement that it had been assigned to his wife. On the argument of the motion, however, the bankrupt changed his position and asked leave to schedule the policy *as his own asset* (R. 182, fol. 576; R. 195, fol. 583; R. 198, fol. 594). The Bankrupt therefore acknowledged ownership, dominion and control of said policy #077, and the claim of an alleged oral assignment to his wife was thereby abandoned.

The motion to amend the schedules was denied by the Referee (R. 192-193) and affirmed on review by another District Judge (Decision, R. 197-202; 51 Fed. Supp. 930). No appeal was taken from that decision.

Thereafter the District Court affirmed the Referee's turn-over order of March 2, 1942 (R. 171, 173) and an order thereon was entered on June 17, 1942 (R. 174-175). That District Court Judge, aware of the bankrupt's acknowledgment of complete ownership of policy #077, apparently deemed it unnecessary to continue the controversy with the petitioner. Though the Trustee sought

to have both the bankrupt and his wife punished for contempt for failing to comply with the Referee's turn-over order, only the bankrupt was punished for contempt (R. 204, 208, fol. 623). The petitioner was therefore under no compulsion to comply with the turn-over order.

On July 2, 1942 the petitioner filed her notice of appeal from the District Court's order of June 17, 1942, which affirmed the Referee's turn-over order of March 2, 1942 (R. 176). The bankrupt did not appeal.

Thereafter the petitioner applied to a third District Judge for an order staying the Trustee from enforcing against the bankrupt the contempt order of June 18th, 1942 (R. 614). The petitioner was the sole movant, the bankrupt was not a party to the motion. This motion was denied on July 29th, 1942 (R. 205-206). Neither the petitioner nor the bankrupt sought any further stays of the contempt order, nor was any appeal taken from the order denying the stay.

On the contrary, the bankrupt proceeded to comply with the turn-over order. The petitioner's version of that compliance was: that she had turned over the said policy #077 to her attorneys, authorized them to deliver it to the bankrupt's attorney, and in turn authorized the bankrupt's attorney to deliver the policy to the Trustee's attorney (R. 209, fol. 627; R. 210, fol. 628).

The Trustee maintained his position, however, that the policy had been continuously in the control and possession of the bankrupt and in fact was surrendered by the bankrupt (R. 210).

On August 25th, 1942 the bankrupt's attorney delivered the policy to the Trustee's attorney and simultaneously therewith delivered a written authorization signed and acknowledged by the bankrupt which directed the Insurance Company to accept surrender of the said Policy #077, to pay the Trustee $9,270 out of its cash value, and to pay the cash value which accrued after bankruptcy *to the bankrupt* (R. 208, fol. 624; R. 209, fol. 625).

The payment was duly made by the Insurance Company to the Trustee in accordance with the said authorization.

B. The Evidence.

Through an attorney and an assistant register of the Insurance Company, the following facts were established and were never contradicted:

On May 2, 1926 the Insurance Company issued to the bankrupt as the insured its policy #077 in the principal sum of $25,000. His wife, Florence Hills Rogers, the petitioner, was designated as the beneficiary, the bankrupt reserving, however, the right to revoke this designation (Tr. Ex. 1, Policy of Insurance, R. 122).

At the time of the filing of the petition in bankruptcy, and at the time of the turn-over hearing, there were: no outstanding loans upon the said policy (R. 17); the policy had a cash value of $9,270.70 (R. 54); there was not on file with the Insurance Company any written assignment of the policy, nor had the Insurance Company received any oral notification of any alleged assignment (R. 17-18); the policy specifically provided that no assignment of the policy would be binding upon the Insurance Company unless in writing and filed with the Insurance Company at its home office (R. 122); the bankrupt as the insured could exercise all rights of ownership conferred by the policy (R. 66).

The petitioner's claim of ownership of the policy was predicated entirely upon an alleged conversation which she testified took place between herself and her husband in 1937, no one else being present. Her husband was never called as a witness. The petitioner's testimony with reference to the alleged oral assignment consisted solely of a one-sentence version, as follows (R. 100):

> "Q. What was that conversation? A. That he couldn't continue the premium on it and that he

would give it to me, if in any way I could with my policy which I had, if I could adjust it so as I could carry it."

This was completely nullified by the petitioner's admissions on cross examination. After reading to the petitioner portions of her 21 (a) examination, the Trustee obtained the following admission from her (R. 111):

"Q. You could not testify under what circumstances you obtained that policy; is that correct? A. No, *I did not know why I received this policy.* You mean this policy, Mr. Krosner?

Q. I am referring to policy #077, Trustee's Exhibit 1—in your right hand. A. Yes." (Italics ours.)

With reference to the petitioner's alleged possession of the policy from 1937 up to the date of the turn-over proceeding, the petitioner likewise admitted, when confronted with her 21 (a) examination of August 1941 (R. 108), that she could not explain her lack of knowledge in August 1941 of the circumstances under which she had obtained possession of the policy (R. 109).

After considerable sparring with the Trustee's attorney, she finally testified that it was only that very day in the courtroom (January 7, 1942) that she had ascertained from an examination of a "letter" that the policy had been delivered to her in April 1937 (R. 109).

The petitioner claimed that after the alleged oral assignment, the policy was kept in a safe deposit vault at the New Rochelle Trust Company (R. 98). When she was asked by her own counsel if her husband was "co-owner" or "co-lessee" of the said vault, she testified that she did not know (R. 99). Thereafter, she finally admitted that her husband also had access to that box (R. 105).

A representative of the New Rochelle Trust Company testified that the safe deposit vault was jointly in the name of Mr. and Mrs. Rogers (R. 121, 140). When the

bankrupt's name was eliminated from joint access to the box could not be ascertained.

In view of the fact that the bankrupt was the only person, other than the petitioner, who was in a position to testify about the alleged oral assignment and the alleged possession of the policy by the petitioner, the courts below properly considered the failure to call him as a witness as having direct bearing on the "color" of the petitioner's claim.[3]

Concededly the bankrupt was at his own home and was available as a witness (R. 107). The only explanation tendered for the bankrupt's non-appearance was a claim that: "My husband is not able to tell the truth because he does not understand, he cannot remember, he cannot remember even twenty-four hours or an hour or two, his mental condition is such (R. 115-116). This claim was completely unsupported by medical testimony or any competent proof, notwithstanding the fact that the bankrupt had been examined prior thereto on a 21 (a) examination.

In an effort to bolster her alleged claim of the oral assignment of the policy, the petitioner introduced evidence purely circumstantial. This evidence, however, far from tending to establish an oral assignment, further indicated that her claim was fictitious and a mere pretense.

A loan was repaid on policy #077 to the Insurance Company with funds representing the proceeds of another policy of life insurance in the same company, #4076076

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[3] In *U. S. ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153, 154, 44 S. Ct. 54, 56, this Court said:

> "Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character. (Citing cases.)"

See also:

> *Mammoth Oil Co. et al.* v. *U. S.*, 275 U. S. 13, 52, 53, 48 S. Ct. 1, 10, and cases therein cited.

(hereinafter referred to as #076). However, the proceeds of policy #076 were not the petitioner's funds.

Policy #076 was originally issued to Francis Rogers & Sons, Inc. on the life of the bankrupt (R. 110, 111). By resolution of that corporation, this policy was to have been assigned to the bankrupt (R. 138), but was thereafter assigned to Mrs. Rogers (R. 139). The assignment was then recorded with the Insurance Company. However, the premiums on policy #076 had been paid out of the joint account of Mr. and Mrs. Rogers in the New Rochelle Trust Company (R. 54-56, Trustee's Exhibits 16 and 17, transcript of the joint bank account, R. 138, 210). The total of the premiums so paid between May 2, 1928, and June 2, 1936, on policy #076 was $19,883.

Parenthetically, it might be noted that the joint bank account was maintained for a period of ten years, during which time deposits totaling $382,191.92 were made, or an average deposit of $38,000 a year (Tr. Exs. 16 and 17 not printed R. 207). This is hardly a bank account of a housewife.

In paying off the loan on policy #077, the petitioner was not using her own funds, but her husband's.

The petitioner also introduced in evidence four checks signed by her totaling $4,469.75 for premium payments on policy #077. Two were for annual premiums prior to bankruptcy and two for premiums which became due thereafter (R. 147). These checks were drawn on the former joint bank account. However, petitioner's own Exhibit 3 (R. 142), established that when policy #076 was surrendered, part of the cash value so obtained was applied in payment of the loan due on policy #077 and the check for the balance, $7,103.87, was deposited in May 1937 in the New Rochelle bank account (R. 144-145, Tr. Exs. 16 and 17; R. 138, 210).

Therefore, when Mrs. Rogers was issuing checks on that bank account for payment of premiums on policy #077, she was also using funds that had been derived

from her husband's property and was not using her own funds.

Another bit of circumstantial evidence introduced by the petitioner were two forms usually enclosed in premium notices, which permit the insured to designate whether the annual dividends are to be applied towards premium payments. Mrs. Rogers signed her name on two such forms relating to policy #077 (R. 149, 150). The Insurance Company representative admitted that they had received similar requests in former years signed, in one instance, by Alfred M. Rogers, Jr., as Treasurer, and in another by Francis Rogers & Sons, Inc., both of whom admittedly never had any interest in policy #077 (R. 65, 66; Tr. Exs. 12 and 13, R. 135, 136).

The same witness explained that the company was "not so particular" when the dividend is being applied to the premium payment (R. 65). He then went on to testify that the Bankrupt, at all times, except for an intervening period when the policy had been assigned by the bankrupt in writing to the Irving Trust Company, as security for a loan to him, was the owner of the policy and was entitled to exercise all rights conferred under the policy (R. 15, 64, 65, 66).

The course of conduct admittedly pursued by the petitioner subsequent to the date of the alleged oral assignment also stamped her claim as "unsubstantial and obviously insufficient".

She testified that, after the alleged conversations with her husband, an appointment was made with the Insurance Company, which she and her husband kept, at which time arrangements were made to pay off the loan on policy #077. Although she was repeatedly asked to state the details of the conversation had with the Insurance Company's representative at this appointment, her testimony was to the effect that neither she nor her husband had in any manner made mention of the claimed assignment (R. 113).

According to her own story, when she went to the Insurance Company, she took with her policy #076 to cash surrender it, in order to obtain the funds to pay off the loan on policy #077. When policy #076 had been assigned to her, it was by a written assignment which had been filed with the same Insurance Company. Her failure to obtain a similar written assignment of policy #077 at a time when she was at the Insurance Company office, with her husband present, where the forms for assignment were readily obtainable, which could have immediately been signed by her husband and filed with the Insurance Company, further stamped her claim as a mere pretense.

The record also shows that the petitioner had another opportunity to place herself on record with the Insurance Company concerning the alleged assignment of the policy to her, when in April, 1938, a year later, she wrote a letter requesting the insurance company to send the 1938 premium notice to a new address (R. 149). The Insurance Company declined her request unless the bankrupt "personally filled out the enclosed form" and returned it "with his signature thereon" (Petitioner's Exhibit 10 A, R. 148). Thus, when the Insurance Company put her on notice that she had no interest in the policy, even to the extent of directing a change of address for one premium notice, Mrs. Rogers admittedly did nothing.

No explanation was offered by her for her failure to obtain and file with the Insurance Company a written notice of assignment, in the four years that elapsed between the date of the alleged assignment and the institution of the turnover proceedings.

POINT I.

The decision of the Second Circuit Court of Appeals is not in conflict with the decision of another Circuit Court of Appeals on the same matter.

The petitioner seeks certiorari on the ground that the decision in the instant case created an alleged conflict with decisions rendered in other Circuits. There is no basis for this claim. The decisions of other Circuits which are cited on the question of "conflict" were all decided prior to May 3, 1926, at which time this Court decided *Harrison* v. *Chamberlin* (*supra*), 271 U. S. 191, 46 S. Ct. 467 (see comment this brief, *supra*, page 2).

The prior decisions of the Second Circuit Court of Appeals which petitioner claims established the former rule in the Second Circuit from which it allegedly departed in the present case were also decided before *Harrison* v. *Chamberlin* (*supra*).[4]

In *Harrison* v. *Chamberlin*, *supra*, the Court specifically sought to put at rest any conflicts that existed in the several Circuits, for it said at page 194 of 271 U. S.:

> "Without entering upon a discussion of various cases in the Circuit Court of Appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, * * *."

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[4] *In re Midtown Contracting Co.* (1917), 243 Fed. 56; *In re Yorkville Coal Co.* (1914), 211 Fed. 619.

In re Paramount Fireproof Door Co., Inc. (1930), 43 Fed. (2d) 558, and *In re Scheinbaum* (1901), 107 Fed. 247, were not decisions by the Second Circuit Court of Appeals, but by District Courts in that Circuit.

POINT II.

The decision of the Second Circuit Court of Appeals is not in conflict with applicable decisions of this court.

The decision in the instant case is in conformity with the rules which were laid down by this court. *Harrison* v. *Chamberlin, supra.* The Rules were stated as follows (page 193 of 271 U. S.):

> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; but resort must be had by the trustee to a plenary suit. (Citing cases.) However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding. (Citing cases.)
>
> "* * * It is clear, however, that an actual claim may be adverse and substantial even though in fact 'fraudulent and voidable.' *Mueller* v. *Nugent, supra,* 15 (22 S. Ct. 269); *Johnston* v. *Spencer,* 195 F. 215, 220, 115 C. C. A. 167; *Board of Education* v. *Leary, supra,* 525 (149 C. C. A. 573). And, on the other hand, a claim is merely colorable if 'on its face made in bad faith and without any legal justification.' *May* v. *Henderson, supra,* 109 (45 S. Ct. 456).
>
> "* * * we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy,' *Board of Education* v. *Leary, supra,* 527 (149 C. C. A. 573), in matters either of fact or law; and is not to be held merely colorable unless the

> preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense. Compare *Binderup* v. *Pathe Exchange*, 44 S. Ct. 96, 263 U. S. 291, 295, 68 L. Ed. 308; and *Moore* v. *New York Cotton Exchange* (No. 200), 270 U. S. 593, 46 S. Ct. 367, 70 L. Ed. 750, decided April 12, 1926."

It is quite plain from a consideration of the evidence before the courts below and the several opinions of the three courts, that the claim of the petitioner of an alleged oral assignment was precisely within the category of being "unsubstantial and obviously insufficient" in fact, "as to be plainly without color of merit and a mere pretense."

The petitioner concedes that the Bankruptcy Court was not ousted of jurisdiction merely because she labelled her claim as "adverse" and that the Bankruptcy Court had the power to inquire whether that claim was "real and substantial or merely colorable."

The petitioner, however, urges that when the Court concluded that the petitioner's claim was colorable, it necessarily weighed the evidence offered by the petitioner against the evidence offered by the Trustee. That argument is based upon a tortured interpretation of the evidence which was adduced before the Referee.

The Referee was not required to weigh any conflicting evidence. We have heretofore pointed out in the review of the evidence, and as found by the three courts below, the very words out of the mouth of the petitioner, as well as the uncontradicted evidence in the Record, all clearly established that her claim was totally without color of merit and a mere pretense.

The opinion of the Circuit Court clearly does not speak of any weighing of evidence by the Referee, nor does it directly or by implication approve of any procedure which is in conflict with *Harrison* v. *Chamberlin*, *supra*. The petitioner seeks to read those implications into the

Circuit Court's opinion for the sole purpose of having this Court review the fact-findings of the lower courts. Certiorari is not available for that purpose.

Only one of the cases cited by the petitioner, *In re Meiselman*, 105 Fed. (2d) 995, 997, is a decision rendered by the Circuit Court for the Second Circuit subsequent to this Court's decision in *Harrison* v. *Chamberlin*, *supra*. The petitioner asserts that *In re Meiselman* enunciates a principle of law in conflict with the decisions of this Court. An examination of that part of the decision applicable herein, clearly indicates that Judge Clark was following the principles laid down by this Court.

> "It is now settled that if there is a real and substantial controversy of law or fact as to property held adversely to a bankrupt—'a contested matter of right, involving some fair doubt and reasonable room for controversy'—the bankruptcy court is 'without jurisdiction' to adjudicate the matter, but the trustee must have resort to a plenary suit. *Harrison* v. *Chamberlin*, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897, quoting *Board of Education* v. *Leary*, 8 Cir., 236 F. 521, 525; *In re Quan Weing et al.*, 2 Cir., 104 F. 2d 112. But the mere assertion of an adverse claim is not enough, and the court may enter upon a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable. Id.; *May* v. *Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. Hence we must decide whether this case furnishes such reasonable doubt as to make the referee's order, affirmed by the District Court, unjustified. We do not interpret these decisions as requiring the holding that there is reasonable doubt from the claimant's own testimony alone, when it is disbelieved by the referee, or from his claims of law, when not supported by the precedents. A claimant cannot avoid a summary order by the very audacity of his claims of either fact or law. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest and a due con-

sideration of existing law. As soon, however, as a substantial claim is disclosed, the rule is mandatory that the court of bankruptcy cannot proceed further."

POINT III.

In any event, irrespective of the "colorability" of petitioner's claim, the Bankruptcy Court had summary jurisdiction.

It is fundamental that if the Bankruptcy Court has possession, either actual or constructive, of the *res* involved in a turn-over proceeding, it has summary jurisdiction of an adverse claimant for the purpose of determining on the merits any controversy relating to the *res*.

Where a bankrupt has retained dominion and control over the *res*, the Bankruptcy Court has summary jurisdiction.

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481, 60 S. Ct. 628;
Taubel, Scott, Kitzmiller Co. v. *Fox*, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770;
Mueller v. *Nugent*, 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405;
Babbitt v. *Dutcher*, 216 U. S. 102, 30 S. Ct. 372, 54 L. Ed. 402;
May v. *Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870;
Page v. *Edmunds*, 187 U. S. 596, 23 S. Ct. 200, 47 L. Ed. 318.

The undisputed facts in the instant case are: that at the time of the filing of the petition in bankruptcy and continuously thereafter, the Bankrupt had retained all rights under the policy of insurance; no assignment was filed with the Insurance Company nor was it notified of any assignment; and the Bankrupt was the only one

who was in a position to exercise all rights of ownership conferred by the terms of the policy. The evidence also established the bankrupt's possession of the insurance contract. Dominion and control of the policy and its benefits were therefore in the bankrupt.

A policy of insurance is nothing more than a chose in action. Dominion and control is retained by the bankrupt where the alleged assignee has failed to perfect his alleged title by notification to the third party. This has been repeatedly held in the Second Circuit.

In re Lissak, 110 Fed. (2d) 370;
In re Borok, 50 Fed. (2d) 75;
In re Worrall, 79 Fed. (2d) 88;
Schwartz v. *Horowitz*, 131 Fed. (2d) 506;
In re Weston, 68 Fed. (2d) 913.

The aforesaid principle has its roots in *Benedict* v. *Ratner*, 268 U. S. 353, 45 S. Ct. 566. It was there stated (p. 361 of 268 U. S.):

> "But it would seem clear that whether the collateral consist of chattels or of accounts, reservation of dominion inconsistent with the effective disposition of title must render the transaction void."

Further, at page 363, the Court said:

> "But it is not true that the rule stated above and invoked by the receiver is either based upon or delimited by the doctrine of ostensible ownership. It rests not upon seeming ownership because of possession retained, but upon a lack of ownership because of dominion reserved. It does not raise a presumption of fraud. *It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title*, and creation of a lien." (Italics ours.)

Further, at page 364, the Court said:

> "This dominion is the differentiating and deciding element."

While in the *Ratner* case this Court was concerned with the assignment of accounts receivable, the principles are just as applicable to the assignment of any other chose in action such as an insurance policy.

Hence in the instant the Bankruptcy Court in any event had summary jurisdiction.

POINT IV.

There is no important question of Federal Law involved which has not been heretofore settled by this Court.

The discussions under Points II and III of this brief and the many cases decided by this Court cited thereunder, are respectfully referred to this Court in support of this point.

POINT V.

The controversy between the parties has become moot.

This question was presented by us to the Second Circuit of Appeals but was not mentioned in its *per curiam* decision. We present it to this court on the authority of

Langnes v. *Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520;

Story Parchment Co. v. *Paterson Parchment Paper Co. et als.*, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544;

Ryerson v. *U. S.*, 312 U. S. 405, 61 S. Ct. 656, 85 L. Ed. 917.

When during the pendency of an action or an appeal a case becomes moot so that there is no longer any case

or controversy pending, the Court loses jurisdiction and the appeal will be dismissed.

United States v. *Alaska S. S. Co.*, 253 U. S. 113, 116, 40 S. Ct. 448, 64 L. Ed. 808;
Lewis Pub. Co. v. *Wyman*, 228 U. S. 610, 33 S. Ct. 599, 57 L. Ed. 989;
Gulf, etc. R. Co. v. *Dennis*, 224 U. S. 503, 32 S. Ct. 542, 56 L. Ed. 860;
Wingert v. *Hagerstown First Nat. Bank*, 223 U. S. 670, 32 S. Ct. 391, 56 L. Ed. 605;
U. S. v. *Evans*, 213 U. S. 297, 29 S. Ct. 507, 53 L. Ed. 803;
Security Mut. L. Ins. Co. v. *Prewitt*, 200 U. S. 446, 26 S. Ct. 314, 50 L. Ed. 545;
Seldon v. *Montague*, 194 U. S. 153, 24 S. Ct. 613, 48 L. Ed. 915;
Jones v. *Montague*, 194 U. S. 147, 24 S. Ct. 611, 48 L. Ed. 913.

This principle applies, even if the intervening circumstances are not in the control of the appellant, but certainly applies where the appellant has control of the circumstances, as in the instant case.

Mills v. *Green*, 159 U. S. 659, 16 S. Ct. 132, 40 L. Ed. 293;
Chandler v. *Wise*, 307 U. S. 474, 477, 478, 59 S. Ct. 992, 83 L. Ed. 1407;
Lewis Pub. Co. v. *Wyman*, 228 U. S. 610, 33 S. Ct. 599, 57 L. Ed. 989;
Singer Mfg. Co. v. *Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906;
Little v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016.

Where pending an appeal, the appellant obeys the command of the decree appealed from, the appeals have been

dismissed; viz: where taxes, the collection of which was sought to be enjoined, were paid; or where the case is settled or compromised or the judgment or decree voluntarily paid or satisfied.

Singer Mfg. Co. v. *Wright*, 141 U. S. 696, 12 S. Ct. 103, 35 L. Ed. 906;
Little v. *Bowers*, 134 U. S. 547, 10 S. Ct. 620, 33 L. Ed. 1016;
Buck's Stove, etc. Co. v. *American Federation of Labor*, 219 U. S. 581, 31 S. Ct. 492, 55 L. Ed. 345;
Dakota County v. *Glidden*, 113 U. S. 222, 5 S. Ct. 428, 28 L. Ed. 981;
Elwell v. *Fosdick*, 134 U. S. 500, 10 S. Ct. 598, 33 L. Ed. 998;
American Book Co. v. *Kansas*, 193 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 613.

In the instant case the controversy has been terminated. The order of the Referee directing the delivery of the policy to the Trustee has been fully satisfied and complied with.

According to her own version of what occurred, the petitioner surrendered the policy to her husband with the full knowledge that it would be delivered to the Trustee to be cash surendered to the Insurance Company (R. 208, 209-210). She thus participated in the satisfaction of the order appealed from. She did this notwithstanding the fact that she was under no legal compulsion to surrender the policy (if indeed she had it in her possession), because the motion to punish for contempt for noncompliance with the turn-over order was limited to the bankrupt only (R. 208). Indeed, the petitioner recognized this limitation in the contempt order when she made a motion to stay its execution. This motion was brought not on her behalf but solely on behalf of the bankrupt (R. 205).

Therefore, there is no longer any controversy pending and it is unnecessary for this Court to decide a moot question.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

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